Moo Sing Hoe v Tan Bee Yong

HIGH COURT (IPOH) — CIVIL SUIT NO 22NCVC-80–07 OF 2015
SM KOMATHY JC
12 OCTOBER 2016

Trusts and Trustees — Trustees — Liability — Plaintiff entrusted monies with defendant for investment — Plaintiff commenced action against defendant for breach of trusts — Whether defendant misappropriated monies — Whether defendant invested monies in accordance with instructions of plaintiff — Whether defendant could seek relief under s 63 of the Trustees Act 1949 — Trustees Act 1949 s 63

The plaintiff had entrusted the defendant with a sum of RM5.1m for the latter to invest the said monies on his behalf. Upon receiving the monies, the defendant had remitted the monies to JP Morgan Chase and subsequently to Heritage Bank in South America. The defendant had also entered into an agreement ('the agreement') with Bunya Holdings to manage the plaintiff's monies. As event unfolded, the defendant was notified by Bunya Holdings that there were complications with the investment; consequently, the defendant demanded return of the monies from Heritage Bank. Nevertheless, despite numerous reminders by the defendant, no refund was made by Heritage Bank. In the present action, the plaintiff contended that the defendant had misappropriated the monies and used them for her own purposes in breach of contract and in breach of trust. In defence, the defendant submitted that she was not liable to return the monies as the same had been invested in accordance with the plaintiff's instructions. The defendant further submitted that, in the event that the court found that she was in breach of her obligation as trustee, the court should exercise its jurisdiction to relieve her from personal liability for the breach pursuant to s 63 of the Trustees Act 1949 ('the Act') as she had acted honestly and reasonably and ought fairly to be excused from the breach of trust.

Held, allowing the plaintiff's claim and entering judgment against the defendant for RM5.1m with interest and costs of RM10,000:

(1) In order to be absolved from her liability as trustee to account for the monies, the defendant must show that she had transferred the monies in JP Morgan Chase to Heritage Bank on the plaintiff's instructions. In the circumstances, apart from the bare assertion of the defendant, there was no documentary evidence to show that the monies were remitted to Heritage Bank in South America as alleged by her. Further, none of the individuals the defendant had dealt with either from Bunya Holdings, JP

Morgan Chase or Heritage Bank were called to establish that the monies were transferred to Heritage Bank. In the absence of such evidence, the plaintiff was entitled to judgment on the claim. Most crucially, there was no evidence to show that Bunya Holdings was indeed a company incorporated in Switzerland and was an investment company. In addition, the agreement was signed one day after the plaintiff had banked in the monies into the defendant's Maybank account. If indeed it was the plaintiff who had instructed her to sign the agreement with Bunya Holdings, it was odd and improbable that he would have left it to the defendant to deal with the representatives of Bunya Holdings or Heritage Bank (see paras 15, 17, 19 & 22).

(2) The omission of the defendant to seek relief under s 63 of the Act by way of a counterclaim precluded her from raising this. In any event, there was no evidence to show that the investment in Heritage Bank had culminated in a loss to enable the defendant to seek this relief. Nor was there evidence to show that she had acted honestly and reasonably in investing in Heritage Bank through Bunya Holdings (see para 28).

[Bahasa Malaysia summary

Plaintif telah mengamanahkan defendan dengan wang sejumlah RM5.1 juta untuk defendan melabur wang tersebut bagi pihaknya. Setelah menerima wang tersebut, defendan telah meremitkan wang tersebut kepada JP Morgan Chase dan kemudiannya kepada Heritage Bank di Amerika Selatan. Defendan telah memasuki perjanjian ('perjanjian') dengan Bunya Holdings untuk menguruskan wang plaintif. Berdasarkan kejadian-kejadian tersebut, defendan dimaklumkan oleh Bunya Holdings bahawa terdapat komplikasi dengan pelaburan tersebut; akhirnya, defendan menuntut pemulangan wang tersebut daripada Heritage Bank. Walau bagaimanapun, meskipun terdapat beberapa peringatan oleh defendan, tiada pulangan wang dibuat oleh Heritage Bank. Dalam tindakan ini, plaintif berhujah bahawa defendan telah menyalahgunakan wang tersebut dan menggunakannya bagi tujuan-tujuannya sendiri dalam pelanggaran kontrak dan pecah amanah. Dalam pembelaan, defendan berhujah bahawa tidak bertanggungjawab untuk memulangkan wang tersebut kerana ianya telah dilaburkan mengikut arahan-arahan plaintif. Defendan selanjutnya berhujah bahawa, sekiranya mahkamah mendapati bahawa dia melanggar tanggunjawabnya sebagai pemegang amanah, mahkamah patut melaksanakan bidang kuasanya untuk melepaskannya daripada liabiliti peribadi bagi pelanggaran berikutan s 63 Akta Pemegang Amanah 1949 ('Akta') kerana dia telah bertindak secara jujur dan berpatutan dan patut secara adil dilepaskan daripada pecah amanah.

Diputuskan, membenarkan tuntutan plaintif dan memasukkan penghakiman terhadap bagi RM5.1 juta dengan faedah dan kos sebanyak RM10,000:

(1) Supaya dilepaskan daripada liabilitinya sebagai pemegang amanah yang

bertanggungjawab bagi wang tersebut, defendan mesti menunjukkan bahawa dia telah memindahkan wang di dalam JP Morgan Chase kepada Heritage Bank atas arahan-arahan plaintif. Dalam keadaan, selain daripada penegasan kosong defendan, tidak terdapat keterangan documentari untuk menunjukkan bahawa wang tersebut diremitkan kepada Heritage Bank di Amerika Selatan seperti yang didakwa olehnya. Selanjutnya, tidak seorang pun daripada individu-individu yang mana defendan berurusan sama ada daripada Bunya Holdings, JP Morgan Chase atau Heritage Bank dipanggil untuk membuktikan bahawa wang tersebut dipindahkan kepada Heritage Bank. Dalam ketiadaan keterangan sedemikian, plaintif berhak kepada penghakiman atas dakwaan. Paling penting sekali, tidak terdapat keterangan untuk menunjukkan bahawa Bunya Holdings sememangnya syarikat diperbadanankan di Switzerland dan adalah syarikat pelaburan. Selanjutnya, perjanjian ditandatangani satu hari selepas plaintif telah memasukkan wang tersebut ke dalam akaun Maybank defendan. Jika sebenarnya ia adalah plaintif yang mengarahkannya untuk menandatangani perjanjian dengan Bunya Holdings, ia adalah pelik dan sukar diterima akal yang dia akan melepaskan kepada defendan untuk berurusan dengan wakil-wakil Bunya Holdings atau Heritage Bank (lihat perenggan 15, 17, 19 & 22).

(2) Peninggalan defendan untuk mendapatkan relif di bawah s 63 Akta melalui tuntutan balas menghalangnya daripada membangkitkannya. Walau bagaimanapun, tidak terdapat keterangan untuk menunjukkan bahawa pelaburan di dalam Heritage Bank telah berakhir dengan kerugian untuk membolehkan defendan mendapatkan relif ini. Juga tidak terdapat keterangan untuk menunjukkan bahawa dia telah bertindak secara jujur dalam melabur di dalam Heritage Bank melalui Bunya Holdings (lihat perenggan 28).]

Notes

For cases on liability, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3366–3369.

Cases referred to

Nestle v National Westminster Bank plc [1993] 1 WLR 1260, CA (refd)
Singer Manufacturing Company v Wilson (1875) 2 Ch D 434, CA (refd)

Legislation referred to

Trustees Act 1949 s 63

Vijayakumar a/l P Suppiah (MS Raman with him) (Sia Boon Chee & Co) for the plaintiff.
Muhammad Hasanuddin bin Mohd Yusoff (Awi & Co) for the defendant.

SM Komathy JC:

INTRODUCTION

[1] This is the trial of an action in which the plaintiff alleges that the defendant has misappropriated a sum of RM5.1m and used them for her own purposes in breach of contract and in breach of trust. In particular, the plaintiff alleges that the defendant has failed to account for or return the monies which he provided to her to invest on his behalf.

[2] In her defence, the defendant did not dispute that the plaintiff had entrusted her with the monies by banking in the RM5.1m into her account with Maybank Bhd ('Maybank'). She alleged that she remitted the monies to JP Morgan Chase and from there it was remitted to South America on the instructions of the plaintiff, and a Swiss company called Bunya Holdings LLC ('Bunya Holdings'), appointed by the plaintiff to manage the funds. She was not liable to return the monies as the same had been invested in accordance with the plaintiff's instructions. She was merely the conduit to channel the monies, and it was Bunya Holdings that was responsible to return the monies to the plaintiff.

[3] The background to the claim and the circumstances in which it arises are set out in the agreed statement of facts and the undisputed evidence. The plaintiff, aged 38, is a developer. The defendant was a close family friend. On 8 December 2009, the plaintiff transferred a sum of RM5.1m into the defendant's bank account with Maybank. The purpose for the transfer of the money is contained in a letter dated 8 December 2009 ('the acknowledgment letter'). By this letter the defendant acknowledged the receipt of the monies and undertook to remit it overseas and place it with JP Morgan Chase Bank in America ('JP Morgan Chase'). It would be useful to set out in full the said letter:

> This is to confirm that, I the undersigned, received from Mr. Moo Sing Hoe, Nric No : 780808-08-5217, RM 5,100,000/- (Ringgit Malaysia : Five Million One Hundred Thousand Only, (to less Bank charges later) to convert to Euro 1,0005,000.00 Euro One Million and Five Thousand Only). This fund is to place to a certificate of deposit with JP MORGAN CHASE, 270 PARK AVENUE, NEW YORK.

THE TRIAL

[4] The hearing of the trial took place on 14 July 2016. As the defence was in the nature of a confession and avoidance to the plaintiff's claim, the burden of proof was on the defendant to prove this plea. It was agreed that the defendant would therefore open her case first. Both the plaintiff and defendant testified in support of their respective cases. The defendant called as her witness

Encik Osman bin Jamaluddin, a bank officer with Maybank. Encik Osman testified that the RM5.1m was transferred by the defendant to her account with JP Morgan Chase Bank ('JP Morgan Chase'). The plaintiff did not call any witnesses.

THE DEFENDANT'S EVIDENCE

[5] The defendant is 61 years of age. According to the defendant, the plaintiff approached her to be the trustee for an investment he wished to make. He instructed her to convert RM5.1m into euro and to open a certificate of deposit with JP Morgan Chase. She denied making any promises of profit to him if he allowed her to invest in euro on his behalf.

[6] The plaintiff made her sign the acknowledgment letter after crediting the monies into her bank account. The plaintiff further made arrangements for her to sign an agreement with Bunya Holdings to manage his monies parked in her account with JP Morgan Chase. On 9 December 2009, she signed an agreement with Bunya Holdings, which was represented by one Elaine Joy Renauld ('Elaine'). A copy of the agreement was given to the plaintiff.

[7] On the instructions of Elaine and the plaintiff, the monies in her account with JP Morgan Chase were transferred to an account opened in her name with Herritage Bank, a bank in South America. She had opened this account on 29 March 2010 at the behest of the plaintiff. Elaine signed a guarantee agreeing to indemnify her against any losses in this investment.

[8] In February 2011, she was notified by Bunya Holdings that there were complications with the investment as a result of the enactment of a legislation called the Patriot Act in South America. Consequently, on 1 April 2011, she sent an email to Heritage Bank to seek the return of the monies and was assured that a refund would be made in due course. Despite numerous reminders, no refund was made.

[9] In early 2013, she sought the assistance of Bank Negara to recover the monies. In the meantime, she also contacted one Sebastian Boucher, an officer with Heritage, and one WA Hayward from UN Trade at the request of Elaine but to no avail. In early 2014, she sent legal notices to Bunya Holdings and to Elaine. All her attempts to contact Bunya Holdings LCC thereafter were unsuccessful.

[10] The primary aspect of the defendant's evidence which was the subject of cross-examination was in relation to what happened to the monies after it went into her account with JP Morgan Chase. In cross-examination, she answered the following questions:

Q: Following the transfer of funds to JP Morgan the money was never placed in Bunya Holdings, correct?

A: Agree. It was under my name. The money was never placed in Bunya Holdings.

Q: After you transfer the money to JP Morgan's what happened to the money after that?

A: We convert it into a certificate of deposit like FD to my knowledge with Heritage Bank. They have transferred it from JP Morgan to Heritage Bank under a certificate.

Q: Under whose instructions?

A: Under the instructions of the Agreements. From the Plaintiff and Elaine. Only using my name to do the investment for them. I only sign whenever I have to.

...

Q: The money goes to JP Morgan and then to Heritage. Who gave instructions to transfer the money to Heritage?

A: This was arranged by Elaine. She is the other party of the Agreement. She is representing Bunya.

Q: The money were in your name. So could not dealt with it without your consent? She gave instruction to transfer the money?

A: With the instruction from the plaintiff as well.

...

Q: ...

A: Bunya Holdings actually they are investors for us. So her decision to put the money with Heritage Bank under a Certificate of Deposit which can generate higher dividend. Somehow because of the crisis Heritage Bank was actually shut down.

...

Q: What action have you taken because the investment is under your name? What action have you taken to recover the money from whoever it is?

A: We actually make appointment to see Elaine in France. And the date is fixed in June 12.

Q: My question is have you taken any legal proceedings to recover this money?

A: I have sent a letter a demand.

Q: That is all ...

A: She quickly come back with a lot of letters how to do.. since she is a guarantor she need to do the repayment and she has come out with a few proposal how to re-pay the money.

Q: Despite 7 years of lapse you merely send a letter of demand, that's all. In the least have you lodge complaint with relevant Police Department or Public Authorities in Switzerland, America or any other country that you have been kept on talking that is France? From the respective company or Heritage Bank?

A: No. I am not sure where is the Heritage Bank.

[11] In summary, it was the defendant's evidence that she had invested the monies in Heritage Bank as requested by Elaine and the plaintiff, but the investment had been lost because the bank had shut down.

THE PLAINTIFF'S EVIDENCE

[12] The plaintiff testified that the defendant was a family friend and a close friend of his father's. He trusted her. She had represented to him that she could guarantee 100% returns a year, if he invested in foreign currency like euro. Acting on this representation, he credited the monies into her account. He left it to her to invest the monies for him. Initially she kept him informed of what was happening to the monies, but after that she avoided the subject. The major issue which was the subject of cross-examination of the plaintiff was if he was aware of the nature of the investments made by the defendant with his monies.

[13] In cross-examination, he was asked:

Q: When did you transfer the money to the defendant?

A: 2009 December 8 right if I am not mistaken.

Q: Now is 2016 right? Why now you want to take action. Why not in 2010, 2011 or 2012? Why only now you want to take legal action against the defendant?

A: sShe told me be patient. The money is coming back. She gave me a lot of reason. Holiday and I am the last one. Got 1st, 2nd, 3rd, blah, blah, blah a lot of reason until 2013 or 2014, I can't remember so I found out this is not normal so I look for my lawyer to send her a letter. After also same answer, so I want to change.

...

Q: She didn't update you?

A: After sometime no.

Q: Early stage yes?

A: Yes.

A

	Q:	Mr. Moo just now you said that you were given a copy of the agreement. Just now when you were asked any agreement forwarded to you from Bunya Holdings, you said yes.
	A:	Yes.
B	Q:	From that document can you see the company name the money is invested into?
	A:	No.
	Q:	So will you agree with me that you did not even bother to check the agreement that's why you don't even know the company she invest the money? Do you agree that you did not even check the agreement when you receive the agreement?
C	A:	Yes.
	Q:	Do you agree with me if you have read, checked the agreement you should have known where is the money what is the company that the money had been invested in.
D	A:	I am not sure.
	Q:	So I put it to you that it is your fault for not checking the agreement and just let it happen until 2016 only you want to take action.
E	A:	Disagree.
	...	
	Q:	What was your intention when you gave her the money?
F	A:	For a good return.
	Q:	You left the 5.1 million with her and let her decide what she wants to do with the money, how she wants to do it, where she wants to do it? Everything you left it with her?
G	A:	Yes. Yang Arif.
	...	
	Q:	...
H	A:	There is relevance. She approached me. She promised me 100% return therefore I entrusted her with the money and let her decide where she want to place it so she is trustee.

THE ISSUES

I

[14] The issue for determination is whether the monies in JP Morgan Chase were invested by the defendant in accordance with the instructions of the plaintiff. The plaintiff would succeed in his claim if the defendant is unable to establish on the balance of probabilities, that:

(a) the monies have been remitted to Heritage Bank; and

(b) that this was done on the plaintiff's instructions.

EVALUATION OF EVIDENCE

[15] In this case, there is clear documentary evidence to show that the defendant remitted the monies in her Maybank account to JP Morgan Chase. However, apart from the bare assertion of the defendant, there is no documentary evidence to show that the monies were remitted to Heritage Bank in South America as alleged by her. Next, and most crucially, there is no evidence to show that Bunya Holdings is indeed a company incorporated in Switzerland and is an investment company.

[16] I do not accept the defendant's evidence that she did not guarantee 100% returns if the plaintiff permitted her to invest for him. It is unlikely that he would have banked in the monies into her account, if there had been no such representation.

[17] I also do not believe the defendant's evidence that she had signed the agreement with Bunya Holdings on the instructions of the plaintiff. It will be recalled the agreement was signed one day after the plaintiff had banked in the monies into her Maybank account. If indeed it was the plaintiff who had instructed her to sign the agreement with Bunya Holdings, it is odd and improbable that he would have left it to her to deal with the representatives of Bunya Holdings or Heritage Bank.

[18] Learned counsel for the defendant, Encik Muhammad Hasanuddin bin Mohd Yusoff ('Hasanuddin') contended that this civil action was not maintainable as the defendant had acted in accordance with the terms of the acknowledgment letter by placing the monies with JP Morgan Chase.

[19] This submission, in my view, is without merit. If the monies are still in JP Morgan Chase, the defendant must return it to the plaintiff as the monies are in her account. The defendant has acknowledged that the monies are no longer in her account, but have been transferred to Heritage Bank, through Bunya Holdings, on Elaine's and the plaintiff's instructions. In order to be absolved from her liability as trustee to account for the monies, the defendant must show that she has transferred the monies in JP Morgan Chase to Heritage Bank on the plaintiff's instructions.

[20] The plaintiff acknowledged that he was given a copy of the agreement the defendant had signed with Bunya Holdings. Even assuming without deciding that Bunya Holdings was a genuine investment company, this would

mean the plaintiff must be imputed with the knowledge that the monies in JP Morgan Chase would be managed by the former, and had implicitly agreed to or authorised the transfer of the monies to Heritage bank.

[21] The next question that arises then is whether the monies were remitted to Heritage Bank. Encik Hasanuddin accepted that apart from the bare assertion of the defendant, there was no admissible documentary proof to show that the monies were transferred to Heritage Bank. He further accepted that the emails produced by the defendant in this regard were inadmissible in light of the inability of the defendant to produce the original emails or to call as witnesses the persons who had allegedly sent these emails.

[22] None of the individuals the defendant had dealt with either from Bunya Holdings, JP Morgan Chase or Heritage were called to establish that the monies were transferred to Heritage Bank. Their evidence was crucial and could have corroborated her evidence. No explanation was proffered for the omission to call any one of them. In the absence of such evidence, the plaintiff is entitled to judgment on the claim.

[23] There are two other submissions that I must address. First, counsel for the defendant contended both in writing and orally the court should decline to assist foolish litigants who are responsible for their own misfortunes. The plaintiff here had acted like a complete fool in parting with RM5.1m without proper instructions and leaving it to the defendant to invest for him. He cited the case of *Singer Manufacturing Company v Wilson* (1875) 2 Ch D 434 in support of this proposition. The following passage in the judgment of the Court of Appeal in p 447 was read:

> I am not, as I consider, to decide cases in favour of fools or idiots, but in favour of ordinary English people.

[24] There is no doubt that the plaintiff had acted foolishly in supposing that the defendant was in a position to guarantee 100% returns if he permitted her to invest for him. I accept his evidence that he did so because he trusted the defendant. I also accept his evidence that the defendant only kept him informed of the details of his investment in the beginning and ceased to do so after she had given him a copy of the agreement with Bunya Holdings. The documents in the agreed bundle show that he had lodged a police report against the defendant. I am not persuaded by Encik Hassanuddin's argument that the omission to produce the police report demonstrates that there is no merit in the plaintiff's complaints vis a vis the defendant. I therefore do not think the plaintiff's case should be dismissed merely because he was motivated by greed to blindly trust the defendant.

[25] The next point can be briefly dealt with. It is this. Counsel for the

defendant contended that in the event the court found that the defendant was in breach of her obligation as trustee, the court should exercise its jurisdiction to relieve her either wholly from personal liability for the breach pursuant to s 63 of the Trustees Act 1949 as she had acted honestly and reasonably and ought fairly to be excused from the breach of trust.

[26] Section 63 of the Trustees Act provides:

> If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same.

[27] The law governing the duties of a trustee is well established. Trustees should not be reckless with trust money and have a duty to act prudently. See *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260. In the instant case, there is no evidence whatsoever to suggest that the defendant had carried out any background checks to verify that Bunya Holdings was a genuine investment company.

[28] I would express my agreement with counsel for the plaintiff that the omission of the defendant to seek relief under section of the Trustees Act by way of a counterclaim precludes her from raising this. In any event, there is no evidence to show that the investment in Heritage Bank has culminated in a loss to enable the defendant to seek this relief. Nor is there evidence to show that she had acted honestly and reasonably in investing in Heritage Bank through Bunya Holdings.

CONCLUSION

[29] In all the circumstances, the plaintiff's case as set out in the statement of claim succeeds and judgment is entered against the defendant for RM5.1m with interest and costs of RM10,000.

Plaintiff's claim allowed; judgment entered against defendant for RM5.1m with interest and costs of RM10,000.

Reported by Dzulqarnain Ab Fatar